Speedrack Products Group Limited *and* United Steelworkers of America, AFL–CIO, Petitioner. Cases 10–CA–29200 and 10–RC–14124[1]

April 9, 1998

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

This case, on remand from the United States Court of Appeals for the District of Columbia Circuit, presents the issue of whether four work-release inmates (WRs) share a community of interest with other unit employees and are thus eligible voters in the unit found appropriate. The Board's original decision, reported at 320 NLRB 627 (1995), held that the WR employees did not share a community of interest with the regular ''free-world'' unit employees, and they were, therefore, ineligible to vote. The challenges to their ballots were accordingly sustained. The Union, having received the majority of the then valid votes, was certified by the Board as the collective-bargaining representative of the unit employees.[2] Thereafter, on August 23, 1996, the Board issued a Decision and Order, 321 NLRB No. 143 (not reported in Board volumes), finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and ordered the Respondent to bargain with the Union.

The Respondent filed a petition for review with the court of appeals and the General Counsel filed a cross-petition for enforcement of its Order. On June 20, 1997, the court issued its decision granting the Respondent's petition for review and denying the Board's cross-petition for enforcement.[3] In remanding the case to the Board, the court directed the Board to reconsider its decision because it ignored applicable Board precedent, in particular, *Winsett-Simmonds Engineers, Inc.*[4] and its progeny.[5]

On September 25, 1997, the Board advised the parties that it had accepted the court's remand and solicited statements of position on the remanded issue from the parties.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered its original determination regarding the WR employees in light of the court's remand and the parties' statements of position. In agreement with Chairman Gould's dissent in the underlying representation case, we have decided to apply *Winsett-Simmonds*, supra, in which the Board held that the existence of a shared community of interest between WR employees and other employees will be determined solely on the status of the WR employees while in the employee relationship and not on what ultimate control the WR employees may be subjected to by prison authorities at other times. Under this standard, we find, for the reasons set forth below, that the WR employees share a sufficient community of interest with the unit employees and accordingly are eligible voters.

It is undisputed that the WR employees are completely integrated into the Respondent's work force and enjoy the same wages, hours, and other terms and conditions of employment, including fringe benefits, as the ''free-world'' unit employees. It is also undisputed that the WR employees work alongside the ''free-world'' employees and are subject to the same supervision while performing bargaining unit work. To these facts, the hearing officer correctly applied the test enunciated in *Winsett-Simmonds*, supra, and correctly concluded that the WRs shared a sufficient community of interest with the ''free-world'' unit employees to be included in the bargaining unit.[6]

We also find no merit in the contention that the Department of Corrections (DOC) policy, as it relates to restrictions on union activities, precludes an adequate community of interest between the WRs and ''free-world'' employees. In finding no such inherent conflict, we rely on the formal opinion letter approved by a DOC commissioner, stating that WRs are allowed to vote in Board representation elections and to work within a bargaining unit with union representation. In view of this statement, we need not decide whether any attempt by corrections authorities or by state statutes to bar lawful Section 7 activities by inmates working with other employees under the Board's jurisdiction is preempted.

Accordingly, we adopt the hearing officer's findings and recommendations. Therefore, we shall vacate our 8(a)(5) and (1) finding and our prior certification of the Union. We shall also overrule the challenges to the four ballots cast by the WRs[7] and direct that they be opened and counted and a new tally of ballots issue. If the Union receives a majority of the votes, then the

[1] The representation case number has been included in the caption consistent with the subject of the court's remand.

[2] Id. at 629.

[3] 114 F.3d 1276 (D.C. Cir.).

[4] 164 NLRB 611 (1967).

[5] See *Georgia-Pacific Corp.*, 201 NLRB 760 (1973).

[6] Contrary to our concurring colleague, we do not believe there is a need to expand the factors that comprise our traditional community-of-interest analysis beyond those that are significant to the employee relationship. Therefore, we do not find it relevant that the WR employees are subject to certain other DOC restrictions unrelated to working conditions by virtue of their participation in the work-release program. We note that most of them take effect after the WRs complete their work shifts and are no longer in an employee relationship. Chairman Gould has set forth additional views on this matter.

[7] Raymond Irvin, Danny Blackstock, Wilbert Smith, and Phil Kelly.

Regional Director shall issue the appropriate certification, but if the Union does not have a majority, then the election shall be set aside on the basis of the objectionable conduct committed by Speedrack during the first election, as previously found, and a second election shall be held when deemed appropriate by the Regional Director.

ORDER

1. The Board's original Decision and Order in Case 10–CA–29200, finding a violation of an 8(a)(5) and (1) refusal to bargain on the part of the Respondent, is vacated.

2. The Board's original Decision and Certification of Representative in Case 10–RC–14124 is vacated.

DIRECTION

IT IS DIRECTED that this proceeding is remanded to the Regional Director to take such action as is consistent with this Decision, Order, and Direction and any other further appropriate action.

CHAIRMAN GOULD, further concurring.

I agree with the decision to apply the Board's decision in *Winsett-Simmonds Engineers, Inc*., 164 NLRB 611 (1967), and find that the four work-release employees share a sufficient community of interest with the ''free-world'' unit employees to be included in the unit and to overrule the challenges to their ballots. As I stated in my dissenting opinion in the underlying representation case, 320 NLRB 627, 629–630 (1995), the decisions in *Winsett-Simmonds*, supra, and *Georgia Pacific Corp*., 201 NLRB 760 (1973), represent the Board's determination that whether work-release employees share a community of interest with their fellow employees depends on their status while in the employment relationship and not on the ultimate control they may be subjected to at other times. Citing my dissent, the Court of Appeals for the District of Columbia Circuit found that the ''work release employees were 'completely integrated' into Speedrack's workforce,'' and ''[t]hus under *Winsett-Simmonds* and the Board's other cases, Speedrack's employees appear to share a community of interest and to be eligible to vote in the representation election.'' *Speedrack Products Group, Ltd. v. NLRB*, 114 F.3d 1276, 1282 (1997). As the court stated, the ''emphasis on a work release employee's status on the job is eminently reasonable, since the focus of the community of interests test is on the interests of employees *as employees*, not their interests more generally.'' Id. at 1280 (emphasis in the original).

My concurring colleague, however, would expand the community-of-interest analysis to consider the presence or absence of correctional authority constraints on other employee activities related to working conditions. While I am unclear what ''employee activities related to working conditions'' she intends to include within her expanded community-of-interest analysis, I would find that such correctional authority constraints are irrelevant to the community-of-interest analysis where those constraints do not differentiate work-release employees from other employees *in their relationship to their employer*.[1]

Member Fox notes, in particular, that a work-release employee's ''freedom to attend union meetings after working hours, to participate fully in the collective-bargaining process, and to engage in other collective efforts to affect workplace conditions'' are relevant to determining community of interest. In *Winsett-Simmonds*, supra, the Board specifically found that the requirement that work-release employees abide by certain rules of conduct and return promptly to their work-release facility did not preclude the existence of a community of interest with other employees even though these restrictions might prevent work-release employees from picketing in event of a strike or attending union meetings which occur in the evening.[2]

Further, taking my concurring colleague's language at its most inclusive, her consideration of constraints on the right of work-release employees to strike as a factor in finding community of interest assumes an adversarial approach to industrial relations and ignores the movement toward workplace cooperation I have long supported.[3] To be sure, Sections 7 and 13 of the

[1] I recognize that work-release employees may be under restrictions which preclude the union from bargaining over certain terms and conditions of their employment, however, there remains a whole range of issues over which the union can bargain. Cf. *Management Training Corp*., 317 NLRB 1355 (1995) (in determining whether to assert jurisdiction over an employer, the Board stated that it would no longer base jurisdiction on its assessment of the quality and/or quantity of factors available for negotiation).

[2] 164 NLRB at 612. In other contexts, as the D.C. Circuit noted, the Board has long held that employees subject to the ultimate control of outside forces may be included as part of an appropriate bargaining unit if the usual community-of-interest criteria are satisfied. 114 F.3d at 1280 (citing *Terri Lee, Inc*., 103 NLRB 995 (1953) (soldiers on active duty in the United States Air Force found to have sufficient community of interest with other employees where they are scheduled for regular work and perform same general duties and subject to substantially the same working conditions as other employees), and *Shepard's Uniform & Linen Supply Co*., 274 NLRB 1423 (1985) (vocational student shares a community of interest with other employees where vocational school's rules did not require employer to treat student differently from other employees)). See also *Evergreen Legal Services*, 246 NLRB 964 (1979) (the Board found that employees employed pursuant to the Comprehensive Employment and Training Act (CETA) shared a sufficient community of interest with the employer's regular employees despite the additional benefits available to the CETA employees and their indefinite length of employment due to financial constraints facing the Federal employment assistance program).

[3] See, e.g., William B. Gould IV, *Japan's Reshaping of American Labor Law* (MIT Press, 1984); and William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law* (MIT Press, 1993).

Act protect the employee's right to withhold his or her labor in order to resolve differences with the employer.[4] In my view, however, the primary thrust of labor policy ought to be on more rational and cooperative avenues for labor and management to pursue and that strikes and picket lines, while part of the statutory scheme, should be a measure of last resort as a practical matter. As I stated in my separate opinion in *Keeler Brass Co*., 317 NLRB 1110 (1995), the transformation of the employer—employee relationship from one of adversaries locked in unalterable opposition to one of partners with different but mutual interests who can cooperate with one another is necessary for the achievement of true democracy in the workplace. 317 NLRB at 1117.

This is yet another reason why we should remain faithful to the thrust of both my dissent and the Court of Appeals' decision in the instant case and measure community of interest through integration into the employment relationship itself. Thus, the test is not whether the parties can wage conflict against one another but rather whether employees have in fact been integrated into the work force itself.

[4] Sec. 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 13 provides:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

MEMBER FOX, concurring.

I am in agreement with my colleagues on the result reached in this decision based on the particular facts of this case. Contrary to my colleagues, however, I would modify the test set out in *Winsett-Simmonds Engineers, Inc*., 164 NLRB 611 (1967), and its progeny by expanding it beyond its narrow focus on factors defining the employment relationship while the WR employees are actually on the job. In my view, the presence or absence of correctional authority constraints on other employee activities related to working conditions is also relevant to the community-of-interest analysis. In particular, I would consider constraints, if any, on the WR's freedom to attend union meetings after working hours, to participate fully in the collective-bargaining process, and to engage in other collective efforts to affect workplace conditions. Employees who are prevented by the authorities who set their conditions of release from engaging in such activities are thereby set apart from the other unit employees in a way that may give them a distinctly different view of the employment relationship.

I am satisfied, however, that there is insufficient evidence of such actual constraints here to warrant a finding that the WR employees lacked a community of interest with the other employees, and I, therefore, join in the finding that they should be included in the unit.